

HOLLAND & KNIGHT LLP
Vito A. Costanzo (State Bar #132754)
Richard W. Petty (State Bar #219633)
633 West Fifth Street, 21st Floor
Los Angeles, California 90071-2040
Telephone (213) 896-2400
Facsimile (213) 896-2450

Attorneys for Defendants
FIDELITY NATIONAL TITLE
INSURANCE CO. AND DEFAULT
RESOLUTION NETWORK

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

KENNETH BARKER, and LOIS
ANNE BARKER,

Plaintiffs

v.

DEFAULT RESOLUTION
NETWORK; FIDELITY NATIONAL
TITLE; MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, INC.;
ALBORG, VEILUVA & EPSTEIN;
TITLE COURT SERVICES INC.;
GENPACT MORTGAGE SERVICES;
DOES 1 through 50, inclusive,

Defendants.

Case No. 08 CV 02898 CW

**DEFENDANT FIDELITY
NATIONAL TITLE INSURANCE
CO.'S REPLY TO OPPOSITION TO
MOTION TO DISMISS
COMPLAINT**

Date: Under Submission
Time: Under Submission
Ctrm: 2
Judge: Claudia Wilken

1 **I. The Court Should Not Consider Any Of The New Allegations Raised By**
2 **Plaintiffs For The First Time In Their Opposition To This Motion**

3 Rather than oppose the motion of defendant Fidelity National Title Insurance
4 Co. ("Fidelity") on the merits, plaintiffs Kenneth and Lois Anne Barker
5 ("Plaintiffs") have attached a copy of a complaint filed in the United States
6 Bankruptcy Court for the Southern District of Texas and have attempted to
7 incorporate the facts alleged in that complaint into their opposition to Fidelity's
8 motion to dismiss. However, none of the allegations about an illegal fee-splitting
9 conspiracy and kickbacks between Fidelity and its attorneys are alleged in the
10 operative complaint. Because these allegations are not included in the complaint,
11 they cannot provide a remedy for any of the defects identified by Fidelity in support
12 of its motion. Thus, there is no reason for the Court to consider those facts or the
13 complaint attached to the opposition in ruling on the motion to dismiss.

14 **II. There Is Still An Absence Of Sufficient Facts Alleged Under A**
15 **Cognizable Legal Theory**

16 Even if the Court were to consider the new allegations about an attorney fee-
17 splitting conspiracy offered in support of the opposition (which it should not), the
18 Plaintiffs still cannot allege sufficient facts under a cognizable legal theory against
19 Fidelity. *In re Ernest Harris and Mattie Harris*, the case after which Plaintiffs are
20 modeling their proposed amended complaint, involved the alleged payment of
21 kickbacks of a portion of attorneys' fees earned by counsel for companies that
22 service mortgages to their clients after those fees were paid by the debtors in
23 bankruptcy actions pursuant to the term of the underlying mortgages.

24 The facts here are nothing like those presented in *In re Ernest Harris* and
25 Plaintiffs cannot allege facts to support a cognizable legal theory by simply cutting
26 and pasting the names Fidelity and Holland & Knight into that complaint in place of
27 the defendants against whom the Harrises brought suit. Fidelity is not alleged to be
28 servicing Plaintiffs' mortgage in the complaint, but rather is alleged to be a title

1 company whose role in the purported racketeering activity is never identified.
2 Holland & Knight is defending Fidelity in a suit being brought by the Plaintiffs for
3 alleged RICO violations and it is a stranger to the foreclosure proceedings against
4 Plaintiffs. In short, Plaintiffs are accusing defense counsel of kickbacking to the
5 defendant a portion of the attorney's fees that they are charging to the defendant for
6 defending against Plaintiffs' frivolous claims. Those allegations simply cannot
7 form the basis for any cognizable legal claim by Plaintiffs against Fidelity.

8 **III. Plaintiffs Have Not Alleged Specific Facts To Support Their RICO**
9 **Claim**

10 Moreover, in their opposition, Plaintiffs implicitly concede that they have not
11 alleged any specific facts in support of their RICO claims. When pressed to point
12 to the specific allegations that support their claims, all that Plaintiffs offer are vague
13 allegations about one defendant's service of a foreclosure notice on Plaintiffs in
14 May. Opposition at 5:27-6:5. Plaintiffs still have not specifically identified which
15 defendant served the notice or even what misrepresentations were made in the
16 notice. Plaintiffs cannot rely on such general allegations that merely track the
17 language of the statute. In the absence of specific allegations, Plaintiffs' claims fail.

18 **IV. Plaintiffs Have Not Alleged That Fidelity Engaged In A "Pattern" Of**
19 **Racketeering Activity**

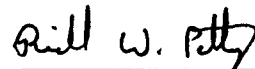
20 As Plaintiffs' opposition makes clear, their complaint revolves around the
21 foreclosure notice served upon them and the foreclosure proceedings being pursued
22 against them. However, a RICO cause of action cannot be based on a single
23 transaction with a single victim. *Medallion TV Enters., Inc. v. SelecTV of Cal.*, 833
24 F. 2d 1360, 1365 (9th Cir. 1987). Plaintiffs have not alleged any facts concerning
25 any other victim or the details of any other foreclosure. All of the specific facts
26 alleged in the complaint concern what purportedly happened to the Plaintiffs. Thus,
27 Plaintiffs have not alleged facts the proof of which would demonstrate a threat of
28 continuing activity, which is necessary to support a valid RICO claim.

1 **4. The Plaintiff Fails To Allege An Injury Cognizable Under RICO**

2 Plaintiffs contend that they have been injured by Fidelity's conduct because
3 they have been prevented from listing their property for sale and because their
4 property has declined in value by \$250,000 since the foreclosure notice was served
5 three months ago. However, no such allegations appear in the complaint and, even
6 if they had, Plaintiffs have not explained how the conduct of Fidelity, a title
7 company, has prevented them from listing their property for sale. Simply put, it
8 does not appear that Plaintiffs have suffered any injury as a result of Fidelity's
9 purported conduct.

10 Dated: August 14, 2008

HOLLAND & KNIGHT LLP

11 

12 Richard W. Petty

13 Attorneys for Defendants
14 FIDELITY NATIONAL TITLE
15 INSURANCE CO. AND DEFAULT
RESOLUTION NETWORK

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Barker et al. v Default Resolution; Fidelity National Title; et al.

U.S. District Court- California Northern District (Oakland)

Civil Case No. 08 CV 02898 CW

PROOF OF SERVICE

State of California)
County of Los Angeles) ss.

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 633 West Fifth Street, 21st Floor, Los Angeles, California 90071.

On August 14, 2008, I served the document described a **DEFENDANT FIDELITY NATIONAL TITLE INSURANCE CO.'S REPLY TO OPPOSITION TO MOTION TO DISMISS COMPLAINT** on the interested parties in this action, enclosed in a sealed envelope, addressed as follows:

SEE ATTACHED SERVICE LIST

☒ **[BY MAIL]** Following ordinary business practices, I placed the document for collection and mailing at the offices of Holland & Knight LLP, 633 West Fifth Street, 21st Floor, Los Angeles, California 90071, in a sealed envelope. I am readily familiar with the business's practice for collection and processing of correspondence for mailing with the United States Postal Service, and, in the ordinary course of business, such correspondence would be deposited with the United States Postal Service on the day on which it is collected at the business.

☐ **[BY UPS]** Following ordinary business practices, I placed the document for collection and UPS delivery, "next day air" at the offices of Holland & Knight LLP, 633 West Fifth Street, 21st Floor, Los Angeles, California 90071. I am readily familiar with the business' practice for collection and processing of correspondence for delivery by UPS (Next Day Air), and, in the ordinary course of business, such correspondence would be deposited with UPS on the day on which it is collected at the business.

[FEDERAL] I declare under penalty of perjury under the laws of the United States of America that the above is true and correct.

Executed on August 14, 2008, Los Angeles, California.


Yvonne Fernandez

Barker et al. v Default Resolution; Fidelity National Title; et al.

U.S. District Court- California Northern District (Oakland)

Civil Case No. 08 CV 02898 CW

Service List

Kenneth Barker
2349 Royal Oaks Drive
Alamo, CA 94507

Lois Anne Barker
2349 Royal Oaks Drive
Alamo, CA 94507

Plaintiff, *pro se*

Plaintiff, *pro se*

Michael John Veiluva
Alborg Veiluva & Epstein LLP
200 Pringle Avenue, Suite 410
Walnut Creek, CA 94596
Tel: 925.929.9880
Fax: 925.939.9915

**Attorneys for Defendants
Mortgage Electronic Registration Systems,
Inc.; and Alborg, Veiluva & Epstein.**

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